IN THE

Supreme Court of the United States

JUL 30 1974

MICHAEL RODAK, JR., CLERK

October Term, 1974
No. 74-35

HERBERT C., JR., and ORLENE J. FOSS, ELTON E. MILLER, JR., and CECELIA J. MILLER, WILLIAM A. SCOTT and LINDA T. SCOTT; and JOHN A. LIGHTY and FRANCES MARY LIGHTY,

Plaintiffs and Respondents,

vs.

B. M. OLDEN and BLANCHE M. OLDEN, THOMAS J. DIXON, JR., and BILLIE A. DIXON,

Defendants and Appellants.

Petition for Writ of Certiorari to the Court of Appeal in the State of California, Second Appellate District.

SIDNEY R. ROSE,
1880 Century Park East,
Suite 1518,
Los Angeles, Calif. 90067,
Attorney for Petitioner,
B. M. Olden.

VALENSI AND ROSE,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Defendants and Appellants.

Petition for Writ of Certiorari to the Court of Appeal in the State of California, Second Appellate District.

Petitioner, B. M. Olden, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeal of the State of California, Second Appellate District, filed on February 21, 1974.

Opinion Below.

The Opinion of the Court of Appeal is unpublished, by order of the court. (A copy of said Opinion appears as Appendix "A" hereto.)

Jurisdiction.

The Opinion and Judgment of the Court of Appeal was entered on February 9, 1974. A timely Petition for Rehearing in said Court of Appeal was denied on March 11, 1974. (A copy of said denial appears as Appendix "B" hereto.)

A timely Petition for Hearing in the California Supreme Court was denied on May 1, 1974. (A copy of the notice of denial of said hearing appears as Appendix "C" hereto.)

This Petition for Certiorari is filed within 90 days of said denial by the California Supreme Court.

Jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(3).

Question Presented.

Following a long and complex bifurcated trial in the Superior Court of Los Angeles County before the Honorable Orlando H. Rhodes, Judge, sitting without a jury, a judgment was entered April 9, 1969 against petitioner and certain of his co-defendants.

The trial had commenced in turmoil on December 18, 1967. The defendants (including petitioner) were seeking a dismissal of the case for lack of diligent prosecution under California Code of Civil Procedure §583.[1] Judge Rhodes stated that the record was replete with instances of failures of the plaintiffs (re-

[1]California Code of Civil Procedure §583 at that time provided for discretionary dismissal of a case not brought to trial by the plaintiff if more than two years had elapsed since the filing of the complaint and if there was a lack of diligent prosecution. Another provision provided for mandatory dismissal after five years from filing of the complaint.

This action had been filed December 20, 1962.

spondents here) to proceed with diligence (Reporter's Transcript [RT], page 67) and that it would not be an abuse of discretion to dismiss for lack of diligent prosecution [RT, p. 83]; but he refused to dismiss because, he said, "I am not at all convinced that liability does not exist to some extent here, or I certainly would not rule on the motion in this fashion." [RT, p. 86, lines 15-17.] The judge then ordered plaintiffs to obtain new counsel to try the case competently.

On February 9, 1968, plaintiffs' present counsel moved to substitute himself as attorney of record. [RT, p. 115.] The motion was made *ex parte;* no defendant was represented at the hearing or served with notice of the hearing or copies of the moving papers.

Among said moving papers submitted to the trial judge by said present counsel was a copy of a letter purportedly authored by plaintiffs' prior counsel. Contained in said letter, in a portion that could easily have been blocked out, was the untruthful and misleading statement by said prior counsel of "the fact that pending settlement negotiations have tentatively reached the figure of $20,000.00." (A copy of said letter appears as Appendix "D" hereto.)

Petitioner did not become aware that said statement had been made in writing to Judge Rhodes until after the conclusion of the trial (Clerk's Transcript [CT], page 848.)

The question presented here is whether the due process clause of the Fourteenth Amendment to the United States Constitution, in its aspect of guarantying a fair and impartial trial, is violated when, after commencement of a trial in a State Trial Court, and without the knowledge of the defendant, untruthful and mis-

leading settlement figures are communicated in writing by plaintiffs' (respondents' in this Court) attorney to the trial judge *ex parte*, and the defendant (petitioner in this Court) is not made aware of such communication until after judgment is rendered thirteen months later.

Constitutional Provision Involved.

The Constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution (U.S. Constitution, Amendment XIV, Section 1).

Statement of the Case.

During 1960 and 1961, respondents (respectively) purchased four improved lots in Malibu, California, from defendants in the trial court Kermit Baumoel, Joseph Shiro, and Paul Nelson, who owned said lots and constructed improvements thereon, but with whom respondents had made settlements after a finding of liability by the trial judge. During the rainy season of 1961, the houses on said lots were damaged as a result of earth movements causing said houses to slip and crack.

Respondents brought this action on December 20, 1972, against said above-named defendants and others, including petitioner.[2] The trial was bifurcated and the trial judge made a finding of liability against all defendants; but before trial on the issues of damages respondents settled, as aforesaid, with defendants Baumoel, Shiro and Nelson. Judgment was entered in favor of respondents and against petitioner, Thomas J.

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[2]Petitioner had sold the lots involved to defendants Thomas J. Dixon, Jr., Billie Dixon and Alvin R. Naismith, who then sold the lots to others, including Baumoel, Shiro and Nelson.

Dixon, Jr., Billie Dixon and Alvin R. Naismith on April 9, 1969.[3] Just prior to entry of said judgment, it was discovered by the attorney for Petitioner, Sidney R. Rose, that over one year earlier the trial judge had been told by Respondents' counsel in writing that "pending settlement negotiations have tenatively reached the figure of $20,000.00". [CT, pp. 700-703.]

Said statement had been conveyed to the trial judge in a letter which was made a part of an *ex parte* motion to substitute respondents' present counsel as their attorney of record. [RT, p. 115.] The motion was made without notice to defendants on February 9, 1968, after trial had commenced. No defendant was represented at the hearing or served with the moving papers. [CT, pp. 700-703.]

Said statement of purported settlement negotiations was absolutely untrue [CT, p. 842], and it was delivered by Respondents' counsel to the trial judge at a pivotal period during the trial of the case, when on the one hand Respondents were faced with the very real prospect that their case would be dismissed as not having been diligently prosecuted [RT, p. 84, lines 24-25], while on the other hand before any evidence had been taken the Judge was already of the expressed opinion that there was liability on the part of the Defendants to the plaintiffs. [RT, p. 86, lines 15-17.]

Neither the Judge nor Respondents' counsel informed any other parties to the action, including Petitioner,

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[3]A copy of the findings of fact and conclusions of law filed and signed by said trial court appears as Appendix "E" hereto. A copy of the judgment of said trial court appears as Appendix "F" hereto.

A comprehensive statement of facts of this entire case, with transcript citations, appears as Appendix "G" hereto.

that said erroneous and misleading statement of purported settlement negotiations had been made to the Judge. [CT, pp. 840-842.] And Petitioner had no knowledge thereof. Throughout the trial, until March of 1969, petitioner labored under the substantial handicap that the mind of the Judge, without Petitioner's knowledge or awareness, was seeded with the prejudicial effect of said erroneous and misleading information suggesting significant liability on the part of the Defendants.

Petitioner's counsel discovered the damaging letter in the court file on March 10, 1969, well after the judge had rendered his decision. [CT, p. 842, line 2.] Thereafter Petitioner filed a timely Notice of Intention to Move for a New Trial, in support of which his counsel made a declaration[4] alleging that the trial had been tainted [CT, pp. 840-842.] The Judge read said declaration, angrily rejected the charge of bias and prejudice, and denied Petitioner a new trial. [RT, p. 3424, *et seq;* RT, p. 3446, *et seq.*]

Petitioner, as the appellant, appealed the decision of the trial court to the Court of Appeal of the State of California, and asserted, among other issues, the issue of bias and prejudice presented herein. The Court of Appeal held that "The claim of reversible error based on purported bias and prejudice of the judge is without merit." (Appendix "A", p. 14.)

In his Petition For Rehearing to said Court of Appeal and in his Petition for Hearing to the California Supreme Court Petitioner continually asserted said issue raised herein. The Petition For Hearing was denied on May 1, 1974.

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[4]A copy of said declaration appears as Appendix "H" hereto.

REASON FOR GRANTING THE WRIT.

The Court of Appeal Decision Conflicts With Decisions of This Court Concerning the Right to a Fair and Impartial Trial as a Fundamental Element of Due Process.

1—It is well recognized that the right to a fair and impartial trial is a fundamental element of due process of law (*Tumey v. State of Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749) and that the preservation of that right requires that the facts upon which a judicial decision is to be based be presented at a fair and open hearing. (*Ohio Bell Telephone Company v. Public Utilities Commission,* 301 U.S. 292, 57 S.Ct. 43, 67 L.Ed. 157.)

2—Secondly, a fair trial requires not only an absence of actual bias, but an absence of the appearance of bias. (*Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749; *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942.) Bias has been defined as a "bent of mind that may prevent or impede impartiality of judgment." (*Berger v. United States,* 255 U.S. 22, 33-34, 41 S.Ct. 230, 233, 65 L.Ed. 481.)

3—In the case at bar the trial judge, prior to trial, had stated his feeling that liability existed on the part of the Defendants (including Petitioner) to the Plaintiffs. [RT, p. 86, lines 15-17.] Then, in the midst of trial, said Judge was informed at an *ex parte* hearing, in a writing submitted by the Plaintiffs' attorney to him, but not served on any Defendant, that settlement negotiations had reached a substantial, specific figure.

Said information was absolutely untrue, but Petitioner was unable to take any steps to dispel the "evidence" of liability thus presented to said Judge, because

Petitioner was not made aware of the communication until the trial was concluded some thirteen months later.

In the case of *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 57 S.Ct. 43, 67 L.Ed. 157, the respondent Commission had considered evidence gathered by itself without notice to petitioner and had based a rate-making determination thereon. This Court held that such a procedure violated the fundamental requirement of the due process clause of the Fourteenth Amendment to the United States Constitution, that a party have a fair and open hearing, and further held that petitioner was entitled to an opportunity to be advised of and to rebut such evidence.

The same process of evidence taking, which was condemned in the *Ohio Bell* case, *supra*, occurred here, except that the trial court here did not admit that said *ex parte* communication played any part in its decision making.

Nevertheless, given the circumstances here, of an *ex parte* but untrue statement of a significant offer of settlement conveyed to the trier of fact during trial, it cannot be said that the appearance of justice and fairness was preserved within the requirements of due process of law. (*In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L.Ed. 942; *Offutt v. United States*, 348 U.S. 11, 75 S.Ct. 11; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.)[5]

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[5]The cited cases are applicable to civil proceedings as well as criminal proceedings, though each one cited above involved a criminal proceeding. See *Hobson v. Hansen* 265 F.Supp. 902 (1967).

The Court of Appeal held, however, that, despite said *ex parte* communication, there had been a fair trial and the Judge was not biased or prejudiced by reason of said communication.

The opinion of the Court of Appeal in this regard is in conflict with the cited decisions of this Court, which recognized that a fair trial requires an impartial trier of fact and that the appearance and the substance of that impartiality cannot exist where "evidence" is accepted without the knowledge of one of the parties to the litigation.

Conclusion.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the Judgment and the Opinion of the California Court of Appeal.

Respectfully submitted,

SIDNEY R. ROSE,
Attorney for Petitioner.

VALENSI AND ROSE,
Of Counsel.

APPENDIX A.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Herbert C. Foss, Jr., et al., Plaintiffs and Respondents, vs. B. M. Olden, et al., Defendants and Appellants. Civ. No. 38490. Superior Court No. WEC 2316.

Filed: February 21, 1974.

APPEALS from a judgment of the Superior Court, County of Los Angeles. Orlando H. Rhodes, Judge. Affirmed.

Valensi & Rose, Sidney R. Rose and Lawrence F. Nelson, Jr., for Defendant and Appellant B. M. Olden.

Walter R. Trinkaus for Defendants and Appellants Dixon.

Pollock & Palmer, Samuel C. Palmer and Charles J. Post for Plaintiffs and Respondents.

Defendant Olden purchased 20 acres of real property in Malibu with the intention of putting a motel on a portion of the property. In 1952 and 1953 he made extensive cuts and placed extensive and deep fill in certain portions of the property, including the property later purchased by plaintiffs Foss, Lighty, Miller and Scott. Before June 1957, defendant Olden abandoned his plan to develop portions of the property as a motel site and decided to create a development called Bayshore Estates on some of the property. This was to be used for single family residences. Between June of 1957 and April 1958, Olden sold certain portions of Bayshore Estates to defendants the Dixons[1] and Nai-

[1]Defendant Billie J. Dixon was, at the time of some of the transactions, the fiance of defendant Thomas J. Dixon. She is referred to in some places in the record under her former name: Billie Geldner.

smith. These portions were divided by the three appealing defendants into six parcels which were then subdivided into 22 lots. The property was so divided in the various transactions that no subdivision into 5 or more lots was effected, thus (arguably) avoiding any necessity for compliance with the Subdivision Map Act as that statute then read. It was the intention of Olden, the Dixons and Naismith to sell in the immediate future to potential builders the lots as ultimately created.

During 1957 and 1958 further cuts and fill were placed on the property which was to become that of the plaintiffs.[2] The lots were completed in such a way that the fill was concealed. Olden had informed Naismith and the Dixons of the fill operation. The Donald R. Warren Co., issued a final report indicating compaction was 90 percent and a copy of the report was sent to the Los Angeles County Building Department. The depth of the fill extended from 22 feet to 26 feet on each of the plaintiffs' lots.

Although the Donald R. Warren Co. report that was filed with the Los Angeles County Building and Safety Department showed the existence of fill, none of the plaintiffs looked up this report.

During 1959, the four residential lots involved in this suit were sold to speculative builders (defendants Baumoel, Schiro and Paul Nelson). Olden, Dixon and Naismith knew, at the time the lots were sold to the defend-

[2]As we read the record, the cut and fill operations during 1957 and 1958 were performed by Olden as part of his obligations under the sales to the Dixons and Naismith.

ant builders, that those purchasers intended to sell the houses to be constructed to members of the public and that none of them were purchasing with the intent to build houses for their own use.[3] Pursuant to that plan and expectation, the builders did construct houses on each of the four lots herein involved and, during 1960 and 1961, the builders sold the lots and houses to the four plaintiffs.

Three of the plaintiffs asked the builders if there was fill on their property; all of the builders replied that there was no fill, only solid cut. The fourth plaintiff made no inquiry. All of the plaintiffs testified that they would not have bought their houses if they had known that they were constructed on fill.

Although defendant Thomas J. Dixon testified that he told each builder that there was fill on the lot or lots

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[3]As to this, the trial court found, in its Finding No. 10:

"Defendant Thomas J. Dixon, Jr. as a part of the conspiracy and as a co-conspirator and as a further scheme to promote the sale of lots in the Bayshore Estates Subdivision, arranged for the transfer of title and did transfer the said title to the Foss, Lighty, Miller and Scott parcels to certain Spec Builders, who as a part of the transaction, were to construct single family dwellings for immediate resale to members of the public. Defendant Thomas J. Dixon, Jr., acting as both a co-conspirator and as President of Security Federal Savings & Loan Association of Los Angeles, arranged for unconventional interim construction financing from the Association for the Spec Builders, who did, between 1959 and April of 1961, construct a single family dwelling on the Foss, Lighty, Miller and Scott parcels. The Defendant Subdividers, as co-conspirators, knew at all times that the Spec Builders were not members of the public, who buy homes and lots, and that the Spec Builders did not intend to reside in the single family dwellings, but rather intended to resell the same upon completion to members of the public. At no time did any of the Spec Builders, who constructed single family dwellings on the Foss, Lighty, Miller and Scott parcels, in fact, reside in any of the said single family dwellings on said parcels."

the builder was buying, each builder denied that he was so informed. The trial court resolved that conflict against the appealing defendants.[4]

Builder Nelson said he could see some fill but did not know it ran to his lot. Builder Schiro also knew of some fill. Each builder testified that no disclosure was made to him regarding the existence of fill, and that he could not tell there was fill on his particular lot from visual observation, but each builder knew or suspected fill in places here and there. Although Schiro knew there was engineered fill in the subdivision, he did not knew the character of the subsoil in his lot. Schiro could not tell whether the earth disgorged in the process of digging a seepage pit on his property was fill or not.

Plaintiffs' houses were damaged as a result of earth movements causing the houses to slip and crack. At the liability phase of the trial the court found that defendants (speculative builders) Baumol, Nelson and Schiro were liable to plaintiffs for fraud,[5] and that defendants B. M. Olden, the Dixons, and Naismith were also liable to plaintiffs for fraud. Defendants E. M. Olden, Thomas J. Dixon, Jr., and Billie A. Dixon appeal from the judgment.

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[4]Finding of Fact No. 11 reads as follows:

"At no time did the Defendant Subdividers disclose the existence or depth of the fill to the Spec Builders and the Spec Builders did not know of the existence or depth of the said fill. The Spec Builders failed to disclose the existence, extent or depth of the fills to the Plaintiffs Foss, Lighty, Miller and Scott."

[5]That finding appears in a minute order entered after the trial had closed. Thereafter the builders settled with plaintiffs and the formal findings, entered in support of the judgment, recite those settlements and a credit to the appealing defendants for the sums paid plaintiffs under the settlements; the formal findings are silent as to liability of the builders to the plaintiffs. The judgment runs against Olden, the Dixons and Naismith only.

We consider, first, the question of the liability of Olden, Thomas J. Dixon and Naismith[6] to the four plaintiffs.[7] Thereafter we consider various procedural contentions made by the appealing defendants and, finally, the question as to the liability of Billie J. Dixon (Geldner).

I

Primarly, the appealing defendants contend that only the builders (if anyone) were liable to the plaintiffs and that the appealing defendants, as remote vendors, had no duty to the ultimate purchasers, with whom they had had no dealings. We disagree.

The trial record is long, and the briefs exhaustive. Stripped of lengthy contentions to the effect that liability could not be based on certain theories[8] the situation as found by the trial court, was a simple one: the appealing defendants knew that extensive fill was on the property sold to the builders; they knew that the existence of that fill endangered any houses built on the filled ground and that its existence was material to any purchaser, immediate or ultimate; they were

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[6]Although Naismith did not appeal, his conduct, part of the conspiracy, is chargeable to the other defendants.

[7]The trial court found that the acts of the three appealing defendants were part of a "common plan, scheme, device and conspiracy." It follows that the two principal appealing defendants have equal liability toward each of the plaintiffs. As we indicate in the text there are separate problems as to the extent of the involvement of Mrs. Dixon. However, as to the three male defendants there was ample evidence, including the use of the "checkerboard" method of subdivision, to support the finding of concerted action.

[8]The appealing defendants argue that there was no liability under section 1710 of the Civil Code. Except for stating the general rule that "the suppression of a fact by one who is bound to disclose it" is a deceit, that section merely starts the chain of reasoning which leads to ultimate liability.

under a duty to the speculative builders to disclose the extent of that fill;[9] they intentionally concealed the fact of that fill from them;[10] that concealment was for the purpose of enabling the builders to resell the lots, improved with houses, without disclosure of the fill; the builders acted toward the plaintiffs exactly as the appealing defendants had anticipated.

The liability of the appealing defendants, thus rests on well settled rules of proximate cause. In section 870 of the Restatement of Torts, it is stated:

> "A person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results, except where the harm results from an outside force the risk of which is not increased by the defendant's act."

In Comment (e) to that section, the Restatement refers to the situation here before us:

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[9]The appealing defendants, pointing to references in the findings of fact to the Subdivision Map Act, argue that that act did not impose on them a duty to disclose the existence of fill. We agree. The provision in section 11010 of the Business and Professions Code seemingly relied on by plaintiffs was not enacted until 1965. However, at the time herein involved, it was the law that, apart from any requirement of the Subdivision Map Act, "A misrepresentation or concealment of the known fact of a fill in a lot sold to another constitutes material inducement which works fraud upon the buyer. . . ." (*Buist v. C. Dudley DeVeloiss Corp.* (1950) 182 Cal.App.2d 325, 331; also *Rothstein v. Janss Investment Corp.* (1941) 45 Cal.App.2d 64.) The *Buist* case, written before the 1965 amendment to the Business and Professions Code, held that there is an affirmative duty to disclose fill, irrespective of whether there is actual fraudulent misrepresentation as to fill.

[10]Although Olden did not sell any of the four lots in question to the plaintiffs, he is, as a member of the conspiracy, liable for the conduct of the other defendants.

> "In many situations, an act done with the belief or knowledge that a result will happen has the same consequences as an act done for the purpose of causing the result. Thus one who deceives another, knowing that a third person will be deceived by the misrepresentation, is liable to the third person as he would be if he acted for the purpose of deceiving the third person."[11]

In point is the case of *Massei v. Lettunich* (1967) 248 Cal.App.2d 68. In that case the subdivider, as here, had failed to disclose the existence of fill to his immediate buyer who, as in the case at bench, was expected to build houses and sell them to the public. The court said at page 73: "The contention of Lettunich that he had no contact with appellants and that therefore it was impossible for him to be guilty of deceit toward them is without merit. 'The law is well settled that "representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury gives the person so acting the same right to relief as if the representations had been made to him directly." ' (*Simone v. McKee,* 142 Cal.App.2d 307, 313-314 [298 P.2d 667]; *Wice v. Schilling,* 124 Cal.App.2d 735, 745-746 [269 P.2d 231]; *Cohen v.*

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[11]So, also, in Harper and James, The Law of Torts (1956) § 7.2, page 531: "It is to be noted that it is not necessary that the person making the misrepresentations intend to cause loss to the other or gain a profit for himself; it is only necessary that he intend action in reliance on the truth of his misrepresentations. If he acts for the purpose of such action, it is immaterial what his motive was. *Nor is it necessary that the misrepresentation be made by the defendant directly to the person or class of persons whom he intends to take action in reliance thereon. The misrepresentation may be made through a third person with the intention that it be repeated or passed on to one or more persons.*" (Emphasis added)

Citizens Nat. Trust etc. Bank, 143 Cal.App.2d 480, 484 [300 P.2d 14]; *Odell v. Frueh,* 146 Cal.App.2d 504, 508 [304 P.2d 45, 76 A.L.R.2d 345]; *Granberg v. Turnham,* 166 Cal.App.2d 390, 398 [333 P.2d 423]; *Harold v. Pugh,* 174 Cal.App.2d 603, 608-609 [345 P.2d 112].) No reason appears why this same rule should not be applicable to nondisclosures as well as misrepresentations. The jury could easily have found that Lettunich, in failing to disclose to the Trents that the lots had been filled, did so because he was fearful that the prospective purchasers would in turn learn that fact and be dissuaded."

As we point out in footnote No. 5, the formal findings are silent as to the builders' liability to the plaintiffs. The minute order there referred to was not carried forward into the final findings and tells us nothing as to the trial court's ultimate conclusion on that issue if, indeed, the trial court, aware of the settlements, ever arrived at a final determination with reference to the builders' conduct. Under the principles above discussed, any such finding would be immaterial as to the appealing defendants. If the builders, relying on the nondisclosure as to them, innocently misrepresented the situation, or if the builders, knowing, by their own observation, of *some* fill, negligently failed to inquire and examine further, their conduct—on either hypothesis—was within the contemplation and expectation of the appealing defendant.[12]

It is argued that plaintiffs were at fault in that they could have discovered the existence of fill by looking

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[12]It follows that the failure of the trial court to make additional findings requested by defendant Olden was not error. A court is not required to find on immaterial matters.

up the Warren report. While it has been said that the "mere failure to communicate a matter of public record does not constitute actionable fraud" (23 Cal.Jur. 2d, Fraud & Deceit, § 41, p. 99; *Ward v. Packard* (1861) 18 Cal. 391), we believe that the mere filing of the Warren report with the Building and Safety Commissioner was not a sufficient disclosure to fulfill defendants' duty of disclosure, and that defendants had some obligation to disclose the fill to the builders either in some documents or by some acts that went directly along with the land transaction in question. The purpose of defendants, in filing the Warren report with the building and safety department, was simply to satisfy the requirements of that public department, and was not to protect plaintiff homebuyers from seller's nondisclosures. We find two cases somewhat in point and helpful to the disposition of this issue.

In *Barder v. McClung* (1949) 93 Cal.App.2d 692, it was held that the vendors of residential property committed actual fraud by failing to disclose that use of an apartment was in violation of zoning regulations, and the purchaser was not bound by constructive notice of applicable zoning ordinances since the purpose of the recording act is not to afford protection against one who makes fraudulent representation. As in *Barder v. McClung*, the plaintiffs in the instant case are not bound by constructive notice from the filing of the Warren report, since the purpose of filing with the building and safety commission is to satisfy the requirements of that department, and not to protect plaintiffs from fraud.

Also in point is *Cohen v. Citizens Nat. Trust etc. Bank* (1956) 143 Cal.App.2d 480. In that case the

apartments for sale were constructed without sanction of a building permit and in violation of numerous provisions of the Health and Safety Code. Although the court did not examine the question of whether plaintiffs could have looked up whether the apartments were built without a building permit, the court said that plaintiffs are not to be denied relief just because defendant made no express representation that he had acquired a building permit. However, it is clear that whether that defendant in *Cohen* had filed a building permit was a matter of public record and the plaintiffs in *Cohen* could have found out that no permit was filed. In *Cohen* it was held that full disclosure of all material facts must be made in fairness, and the plaintiffs were not denied relief.

In the case before us, although plaintiff purchasers were required to make a diligent effort they need not search out every document filed anywhere in relation to the pieces of property they were buying. The filing of the Warren report was not sufficient to fulfill defendants' duty of disclosure; under the reasoning of the *Cohen* case and the *Barder* case, such report was not constructive notice.

II

The present case had undergone protracted delays. Eventually defendants moved for a discretionary dismissal under section 583 of the Code of Civil Procedure for plaintiffs' failure to bring the action to trial after two years. The motions were denied on December 18, 1967. The appealing defendants assign error.

In response, plaintiffs first argue that defendants' motions under Civil Code of Procedure, section 583, were not properly before the court because section 583 requires due notice, and due notice was not given

to plaintiffs. A motion for dismissal under section 583 of the Code of Civil Procedure requires that a party give advance notice of the grounds on which relief is sought, so that the opposing party will have an opportunity to make a counter showing, and where it appears that plaintiff is surprised, a judgment to dismiss is a denial of due process. (*Derry v. Superior Court of Los Angeles* (1968) 266 Cal.App.2d 556.)

Defendants contend that, even if notice is required, plaintiffs failed to raise lack of notice, and that a defect in the timeliness of service under Code of Civil Procedure section 583 is waived by plaintiffs' appearance and argument of the motion. (*Lacey v. Bertone* (1949) 33 Cal.2d 649, 651; *Farrar v. McCormick* (1972) 25 Cal.App.3d 701, 705.)

Our reading of the record indicates that plaintiffs did not waive the notice requirement. Plaintiffs' attorney said: "Yes, Your Honor. May I first say that with respect to the motion filed this morning for delay in prosecution, we had not any notice whatever to be prepared to address ourselves with respect to that, and I have to object to the motion . . ." The trial court interrupted to say that plaintiffs' attorney relaized that time was running out and, therefore, he could not claim surprise even though he had not received proper notice of the motion. The fact that, faced with that position by the trial court, counsel proceeded to argue the motion on its merits cannot be regarded as a waiver of the objection properly made.

Ultimately the trial court denied the motion to dismiss and allowed one witness to be called, sworn and testify.

Although plaintiffs' counsel may have realized that his case was nearing the end of the 5-year period, even

without notice of motion, the notice requirements of section 583 had neither been waived nor satisfied.[13] Therefore we hold that the motions for dismissal on December 18, 1967, were not properly before the court because, where dismissal is discretionary, plaintiff must be given notice of the motion to dismiss and an opportunity to be heard. (*Harris v. Board of Education* (1957) 152 Cal.App.2d 677.)[14]

On February 16, 1968, after the 5-year period had run, defendants renewed their motions to dismiss. The motions were denied. Defendants argue that the calling of one witness on December 18, 1967, prior to the running of the 5-year period was insufficient to avoid the mandatory dismissal provision of section 583.

It has been held that a case was brought to trial within the 5-year period where counsel for each party said "Ready" in the calendar department and argued and submitted an issue of law to the trial court for decision (*Katleman v. Katleman* (1959) 175 Cal. App.2d 493), and it has been held that the calling of a single witness was sufficient to stay section 583 when the clerk, without authorization, set the trial date beyond the 5-year period (*Kosturos v. Municipal Court* (1942) 51 Cal.App.2d 700; [also see, *Bella Vista Dev. Co. v. Superior Court* (1963) 223 Cal.App.2d 603, 608, where there is dicta to the effect that, in a trial before a court, there is a partial trial where one

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[13]Section 583 of the Code of Civil Procedure, as it read at the date herein involved, provided: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant *and after due notice to the plaintiff*, whenever plaintiff has failed for two years after action is filed to bring such action to trial. . . ." (Emphasis added)

[14]*Tew v. Tew* (1958) 160 Cal.App.2d 141, it not contra since in that case the issue of lack of notice was not raised in the trial court.

witness is called and he gives some testimony]). Although it has been held that testimony taken for the sole purpose ot getting a continuance, *without any bearing on issues of law or fact,* is insufficient to bring the case to trial under section 583 (*Adams v. Superior Court* (1959) 52 Cal.2d 867), in the case at bench plaintiffs' wi'ness Foss testified on the issue of damage, an issue of fact clearly raised by the pleadings. Thus, the trial court properly denied the motion for a mandatory dismissal since there had been a partial trial before the 5-year period ran.

III

Defendants argue that the case must be returned to the trial court for a hearing on defendant Olden's motion for new trial because, under section 170, subdivision 5, of the Code of Civil Procedure, Judge Rhodes lacked jurisdiction to determine that motion.

Judge Rhodes was competent to rule on defendant Olden's motion for a new trial because defendant Olden was not timely in attempting to raise the issue of disqualification. The question of bias or prejudice on the part of a trial judge must be asserted at the earliest practical opportunity after learning the ground thereof, or it is waived. (*Develop-Amatic Engineering v. Republic Mortgage Co.* (1970) 12 Cal.App.3d 143.) Delays constitute a waiver (see *Alameda Conservation Assn. v. City of Alameda* (1968) 264 Cal.App.2d 284), and here defendants delayed.

Defendant Olden cites the case of *Rosenfield v. Vosper* (1945) 70 Cal.App.2d 217, for the proposition that the motion before the judge was timely. However, in *Rosenfield* it was understood by the parties and the court that the issue of disqualification had been raised in the affidavits which were on file. In the case

at bench there is no similar showing that the issue of disqualification was before the court. As in *Develop-Amatic, supra,* the issue was waived.

Furthermore, the claim of reversible error based on purported bias and prejudice of the judge is without merit. The judge had received an ex parte letter prior to trial showing a pending settlement figure in the sum of $20,000. Judge Rhodes had assured defendants' counsel that he disregarded the objectionable material. He said: "I understand the settlement is no part of an admission of liability . . . I want to make this record lucidly clear: it was not a possible element of consideration in what I decided with respect to this case."

The language in *Cano v. Tyrell* (1967) 256 Cal. App.2d 824, 834, is controlling. The *Cano* court said: "There could be no error, in any event, as the trial judge voluntarily remarked that since there was no jury he would disregard any evidence of an offer to compromise. We must assume that the trial judge followed his gratuitous self-admonition in considering the evidence and arriving at his findings of fact. (*Bixby v. Bixby,* 120 Cal.App.2d 495, 499 [261 P.2d 286].)"

IV

Defendants Dixon argue that the findings on the amount of damages are erroneous. Defendants argue that damages for fraud are to be assessed as of the date of the fraudulent transaction, and that the difference in value used in applying the out-of-pocket rule must be a result of defendants' fraudulent conduct. (*McCue v. Bruce Enterprises, Inc.* (1964) 228 Cal. App.2d 21.) We disagree.

In *Buist v. C. Dudley De Velbiss Corp.* (1960) 182 Cal.App.2d 325, the court stated at page 334: " 'The unqualified language of Section 3343 indicates that the

plaintiff should receive as damages the difference in value between everything with which he parted and everything he received, and *the statute contains nothing to show that the difference must be calculated solely on the basis of the facts existing at the time the contract was made or performed.* The section must be applied realistically so as to give the defrauded person his actual out-of-pocket loss, and, where necessary, to reach that result, the court must consider subsequent circumstances . . .' (*Garrett v. Perry,* 53 Cal.2d 178 at 184 [346 P.2d 758].)" (Emphasis added.)

V

Although Mrs. Dixon signed, at Thomas Dixon's request, various documents in connection with the subdivision and sale of the real property, we are pointed to no evidence that she actively participated in the negotiations or that she was aware of the scope of the conspiracy or of the nondisclosure of the fill. However, the acts of Thomas Dixon were done with reference to, and for the benefit of, property in which she had an interest and they resulted in benefits which, so far as this record discloses, she received, either personally or as a member of the Dixon marital community. The record shows enough of agency on the part of Thomas Dixon to charge Billie J. Dixon with liability for his torts.

The judgment is affirmed.

NOT FOR PUBLICATION.

Kingsley, *J.*

We concur:

Jefferson, Acting *P. J.*

Dunn, *J.*

APPENDIX B.

Los Angeles, Cal. March 11, 1974

Title:

Foss, et al vs. Olden, et al. No. 38490.

THE COURT:

Petition for Rehearing Denied.

Clay Robbins, Clerk

APPENDIX C.

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

I have this day filed Order May 1, 1974.

HEARING DENIED

In re: 2 Civ. No. 38490.

Foss, et al. vs. Olden, et al.

Respectfully,

G. E. Bishel
Clerk

APPENDIX D.

RICHARD C. GEORGE
ATTORNEY AT LAW
1424 Fourth Street, Suite 603-05
Santa Monica, California 90401

February 1, 1968

Telephone
EXbrook 5-7259

POLLOCK AND PALMER
Attorneys at Law
612 South Flower Street
Los Angeles, California, 90017

RE: FOSS et al. vs. OLDEN, et al., Superior Court NO. WEC-2316 SUBSTITUTION OF ATTORNEYS FOR PLAINTIFFS, dated 1-30-68; Your letter of January 29, 1968

Dear Mr. Palmer:

This will acknowledge receipt of your above-referenced letter confirming the matters stated to this office by telephone on the date thereof, as well as receipt of the above original Substitution of Attorneys, executed by your office and apparently by each of the eight plaintiffs in the above action, which was delivered to this office on the above date of 2:00 P.M. by your Mr. Truex.

For the record, please be advised that this office had no information regarding our said clients' (the eight plaintiffs) intention of terminating our attorney-client relationship and our written contingent fee agreement

with them, until first mentioned by your above-mentioned telephone call. We of course knew and in fact participated in their decision—and Judge Rhodes expressed recommendation—to engage *associate* counsel to assist this office in completing the trial of the above action, in light of the five opposing defense firms aligned against the co-plaintiffs. On account of the foregoing, we have no way of knowing upon what information and advice the co-plaintiffs relied in making their decision against "associating" new counsel (the quoted expression was precisely the language used by Judge Rhodes on the date trial commenced in the action last December), and, instead, replacing this office as their attorney of record with your office. However, your professed urgency and insistence that we oblige our clients' wishes by forthwith executing and returning said Substitution prevents us from exploring the matter. This office believes the law to require an attorney-of-record in an action to withdraw as such upon the unequivocal instructions of his client to that effect; and that such client is not required to have a good—nor any—reason therefor.

In light of the foregoing, and notwithstanding the fact that pending settlement negotiations have tentatively reached a figure in excess of $20,000.00, enclosed herewith please find the above-referenced original and fully executed Substitution of Attorneys delivered upon the condition that, and which you are authorized to use by filing and serving copies upon all parties of record thereby acknowledging that, no understanding or

agreement regarding said substitution either exists or was discussed between this office and our said clients, nor does this office acquiesce thereto other than in compliance with the unilateral demand therefor made by said clients (the eight plaintiffs in the above action), and that no agreement, arrangement or disposition has been made between this office and said clients regarding our compensation for the legal services heretofore rendered other than by the original written contingent fee agreement between us which this office regards as being in full force and effect, even after such substitution except for excusing any further obligation to render legal services thereunder due to prevention of performance thereof on account of said substitution.

Yours truly,

/s/ Richard George

Richard George

APPENDIX E.

Findings of Fact and Conclusions of Law.

POLLOCK AND PALMER
ATTORNEYS AT LAW
612 South Flower Street
Los Angeles, California 90017
Telephone 624-1304

Attorneys for Plaintiffs

Superior Court of the State of California for the County of Los Angeles.

Herbert C. Jr., and Orlene J. Foss; Elton E. Jr. and Cecelia J. Miller; William A. and Linda T. Scott, and John A. and Frances Mary Lighty, Plaintiffs, v. B. M. and Blanche M. Olden; Thos. J., Jr. and Billie A. Dixon; Alvin R. and Rosemary Naismith; Kermit J. and Elaine K. Baumoel; Donald R. Warren Co.; Joseph N. and Florence T. Shiro; Barbara and Paul Nelson, dba Nelson Builders; Robert Olden; Does One to Ninety, both inclusive, Defendants. No. WEC 2316.

Filed Mar. 20, 1969.

The above entitled cause came on for trial on November 8, 1967, upon the issues of liability, a jury trial having been waived by all parties. Following denial of motions of dismissal by Defendants, the parties stipulated and the Court ordered that all issues of liability be determined prior to hearing evidence on matters relating to damages and ordered that sanctions in the amount of $3,000.00 be paid by Plaintiffs to Defendants, or in the event of a judgment in favor of Plaintiffs, the sanctions be deducted from such judgment.

On December 2, 1968, and after a determination of liability, the said causes came on for trial for the determination of all remaining issues.

There appeared for Plaintiffs HERBERT C. FOSS, JR. and ORLENE J. FOSS; ELTON E. MILLER, JR. and CECELIA J. MILLER; WILLIAM A. SCOTT and LINDA T. SCOTT, JOHN A. LIGHTY and FRANCES MARY LIGHTY, as their counsel, POLLOCK AND PALMER and SAMUEL C. PALMER III and MAX E. TRUEX. There appeared for Defendants B. M. OLDEN, BLANCHE M. OLDEN, and ROBERT OLDEN, as their counsel, VALENSI and ROSE, SIDNEY R. ROSE. There also appeared for Defendants THOMAS J. DIXON, JR. and BILLIE A. DIXON, as their counsel, WALTER R. TRINKAUS and NICHOLAS GRANET. There also appeared for Defendants ALVIN R. NAISMITH and ROSEMARY NAISMITH, as their counsel, GEORGE A. GEORGE, and JOSEPH GEORGE.

In addition, there appeared for Defendants PAUL NELSON and BARBARA NELSON, as their counsel, ZEMAN & FISCHER and BERNARD FISCHER, and for Defendants JOSEPH N. SCHIRO and FLORENCE T. SCHIRO, as their counsel, BETTS & LOOMIS and TREVOR A. GRIMM, and for Defendants KERMIT J. BAUMOEL and ELAINE K. BAUMOEL as their counsel, JOSEF J. KLEIN. There also appeared for Defendant DONALD P. WARREN CO., a corporation, as their counsel, RUSSELL & SCHUREMAN and T. R. RUSSELL. Prior to trial and in open Court, counsel for Plaintiffs dismissed Defendant DONALD R. WARREN CO., a corporation. The Court, on motion of counsel for the Defendants and during the course of trial, dismissed Defend-

ants ROBERT OLDEN, BLANCHE M. OLDEN, ROSEMARY NAISMITH, PAUL NELSON, BARBARA NELSON, FLORENCE T. SCHIRO, and ELAINE R. BAUMOEL. None of the above referenced motions to dismiss were opposed by Plaintiffs. In addition, and during the course of trial, counsel for Plaintiffs caused dismissals with prejudice to be filed, dismissing KERMIT J. BAUMOEL and JOSEPH N. SCHIRO from the action.

The Court, after full consideration of the pleadings, issues, pre-trial statements, stipulations by counsel, oral and documentary proof and agreements of counsel, now makes the following Findings of Fact and Conclusions of Law upon the submitted issues, constituting the decision of the Court in this action as to the remaining defendants.

FINDINGS OF FACT

1. For the purpose of convenience and clarity, the following words, terms and classifications will be used herein and will have the following meanings in these Findings of Fact and Conclusions of Law:

(a) "Foss Parcel" shall mean a parcel of real property known as 25325 West Malibu Road, located at Malibu, Los Angeles County, California, which was improved with a single family residence between January 1, 1959, and July 18, 1960.

(b) The "Miller Parcel" shall mean a parcel of property known as 25315 West Malibu Road, located at Malibu, Los Angeles County, California, which was improved with a single family residence between January 1, 1959, and June 13, 1960.

(c) The "Lighty Parcel" shall mean a parcel of property known as 25321 West Malibu Road, located

at Malibu, Los Angeles County, California, which was improved with a single family residence between January 1, 1959, and May 25, 1960.

(d) "Scott Parcel" shall mean a parcel of property known as 25331 West Malibu Road, located at Malibu, Los Angeles County, California, which was improved with a single family residence between January 1, 1959, and October 14, 1960.

(e) Defendant "Subdividers" shall mean Defendants B. M. Olden, Thos. J. Dixon, Jr. and Billie A. Dixon, also known as Billie A. Geldner, husband and wife, and Alvin R. Naismith.

(f) "Spec Builders" shall mean Kermit J. Baumoel, Paul Nelson and Joseph N. Schiro.

(g) "Bayshore Estates" shall mean approximately 6.98 acres of real property which was a lower bench and which was divided into 22 single family dwelling lots between June, 1957, and February, 1958, and which included the Foss property, Miller property, Lighty property, and Scott property. The name "Bayshore Estates" was given to this property shortly after February, 1958.

(h) "Defendants Olden, Dixon and Naismith" shall mean Defendants B. M. Olden, Thomas J. Dixon, Jr. and Billie A. Dixon, his wife, also known as Billie A. Geldner, and Alvin R. Naismith.

(i) "Defendants Dixon" shall mean Thomas J. Dixon, Jr. and Billie A. Dixon, his wife, also known as Billie A. Geldner.

(j) "Plaintiffs Foss" shall mean both Plaintiffs Herbert C. Foss Jr. and his wife, Orlene J. Foss.

(k) "Plaintiffs Lighty" shall mean both Plaintiffs John A. Lighty and his wife, Frances Mary Lighty.

(l) "Plaintiffs Miller" shall mean both Plaintiffs Elton E. Miller, Jr. and Cecelia J. Miller.

(m) "Plaintiffs Scott" shall mean both Plaintiffs Linda T. Scott and William A. Scott.

2. On or about April 7, 1952, Defendant B. M. Olden purchased approximately 20 acres of real property located in Malibu, Los Angeles County, California. At the time of this purchase, Defendant B. M. Olden intended to develop certain portions of this real property as a motel complex. As a part of his development plan and in February, 1953, Defendant Olden made extensive cuts and placed extensive and deep fills on portions of this property, including and throughout Bayshore Estates and the Foss, Lighty, Miller and Scott parcels. Subsequently, but before June, 1957, Defendant Olden abandoned his plan to develop portions of the property as a motel site, and decided to create a development on a portion of the property, known as Bayshore Estates, for single family residential purposes.

3. Between June, 1957, and April, 1958, Defendant Olden agreed to sell and did sell, through a series of transactions, certain portions of Bayshore Estates to Defendants Dixon and Naismith. At the time of the sales transactions, the portions of the property which were the subject of the sale were divided by the Defendants Olden, Dixon and Naismith, jointly, into approximately six parcels, and subsequently, but between June, 1957, and April, 1958, and during and as a part of the sales transactions, the said six parcels were re-subdivided into 22 lots. The said lots were intended at the time of the said re-subdivision to be sold by Defendants Olden, Dixon and Naismith in the immediate future. The division and re-division of Bayshore Estates

by Defendants Olden, Dixon and Naismith into six parcels, and subsequently, 22 lots, constituted a subdivision. In this said Bayshore Estates subdivision, Defendants Dixon and Naismith acquired 5 parcels which were redivided into 21 lots, and Defendant Olden retained one parcel which was divided into 1 lot.

4. During June of 1957 and April, 1958, and as a further part of the sales transactions, Defendant B. M. Olden, acting in concert with Defendants Dixon and Naismith, made additional cuts and placed additional substantial and deep fills upon and throughout Bayshore Estates, including the Foss, Lighty, Miller and Scott parcels.

5. The finished grade of the lots in Bayshore Estates, including the Foss, Lighty, Miller and Scott parcels, was completed and leveled in such a way by the Defendants Olden, Dixon and Naismith, that the fills which had been placed thereon in both 1953 and in 1957 and which existed on the parcels, were latent and concealed to all persons, except Defendants Olden, Dixon and Naismith.

6. The completed, graded and concealed fill on the Foss Parcel extended and extends to a depth of 26 feet. The completed, graded and concealed fill on the Lighty Parcel extended and extends to a depth of 25 feet. The completed, graded and concealed fill on the Miller Parcel extended and extends to a depth of 22 feet. The completed, graded and concealed fill on the Scott Parcel extended to a depth of 26 feet.

7. The existence of the 1953 fills and the existence of the 1957 fills on the Foss, Lighty, Miller and Scott Parcels are substantial and affected and affect adverse-

ly and to a material degree the value and desirability of those said parcels.

8. As a part of the purchase and sales transaction of the said six parcels and 21 lots and the retention of 1 lot by Defendant Olden, the Defendants Olden, Dixon and Naismith jointly and acting in concert deliberately, unlawfully and fraudulently entered into a common plan, scheme and device and conspired to evade and avoid the laws, statutes and rules and regulations of the State of California, relating to Subdivisions, contained in the Business & Professions Code, and the Administrative Code and all other laws which require disclosure of the depth and existence of the fills upon the said lots in the Bayshore Estates Subdivision, including the duty to disclose the existence and depth of the fills to Plaintiffs Foss, Lighty, Miller and Scott.

9. The Defendant Subdividers Olden, Dixon and Naismith, acting in concert, jointly and individually, and as a part of the common plan, scheme and device and as a part of the conspiracy, knew that they had a duty to disclose the depth and the existence of the fills to prospective purchasers who were members of the public, and deliberately, unlawfully, and fraudulently, and as a part of the conspiracy, concealed the depth and the existence of the fills to all said prospective purchasers.

10. Defendant Thomas J. Dixon, Jr. as a part of the conspiracy and as a co-conspirator and as a further scheme to promote the sale of lots in the Bayshore Estates Subdivision, arranged for the transfer of title and did transfer the said title to the Foss, Lighty, Miller and Scott parcels to certain Spec Builders, who as a part of the transaction, were to construct single family

dwellings for immediate resale to members of the public. Defendant Thomas J. Dixon, Jr., acting as both a co-conspirator and as President of Security Federal Savings & Loan Association of Los Angeles, arranged for unconventional interim construction financing from the Association for the Spec Builders, who did, between 1959 and April of 1961, construct a single family dwelling on the Foss, Lighty, Miller and Scott parcels. The Defendant Subdividers, as co-conspirators, knew at all times that the Spec Builders were not members of the public, who buy homes and lots, and that the Spec Builders did not intend to reside in the single family dwellings, but rather intended to resell the same upon completion to members of the public. At no time did any of the Spec Builders, who constructed single family dwellings on the Foss, Lighty, Miller and Scott parcels, in fact, reside in any of the said single family dwellings on said parcels.

As a part of the transfer of title transaction and as a part of the common plan, scheme, device and conspiracy, the Defendant Subdividers, as co-conspirators, intended to derive a profit, and did derive a profit, directly and indirectly, from the resale of the single family dwellings to the home buying public by the Spec Builders. After the said common plan, scheme, device and conspiracy was contrived and was being implemented, Defendant Olden did not directly participate in the sales of lots in the Bayshore Estates Subdivision to Plaintiffs.

11. At no time did the Defendant Subdividers disclose the existence or depth of the fill to the Spec Builders and the Spec Builders did not know of the existence or depth of the said fill. The Spec Builders failed to

disclose the existence, extent or depth of the fills to the Plaintiffs Foss, Lighty, Miller and Scott.

12. Plaintiffs Foss purchased the Foss Parcel as improved with a single family dwelling, on or about July 18, 1960 for $42,000.00. Plaintiffs Lighty purchased the Lighty Parcel as improved with a single family dwelling on or about March 25, 1960 for $49,-500.00. Plaintiffs Miller purchased the Miller Parcel as improved with a single family dwelling thereon on or about June 13, 1961 for $43,900.00. Plaintiffs Scott purchased the Scott Parcel improved with a single family dwelling thereon on or about October 14, 1960 for $43,500.00. By reason of the existence, depth and extent of the said fills on the Foss, Lighty, Miller and Scott Parcels, the said Foss, Lighty, Miller and Scott Parcels had an actual value of $22,000.00, $23,000.00, $22,000.00 and $22,000.00, respectively, on the said dates of purchase. Plaintiffs Loss, Lighty, Miller and Scott were members of the home buying public.

13. At the time of the respective purchase of the respective parcels by Plaintiffs, Foss, Lighty, Miller and Scott, said Plaintiffs did not know of the depth or existence of the fills on the respective parcels which they purchased, and the Defendant Subdividers failed to disclose to the Plaintiffs the said existence or depth of the said fills. Said Plaintiffs reasonably relied on their visual inspection of the respective parcels which did not disclose the existence or extent of the concealed fills, and upon their respective erroneous, but reasonable, beliefs that no fill had been placed or existed on the said parcels. The Defendant Subdividers had a duty to disclose to the Plaintiffs Foss, Lighty, Miller and Scott the existence, extent and the depth of the

respective fills on the Foss, Lighty, Miller and Scott parcels prior to the sale of the respective parcels to these said Plaintiffs. Had the Defendant Subdividers disclosed the existence of the fill to the Plaintiffs Foss, Lighty, Miller and Scott, these said Plaintiffs would not have purchased the respective Foss, Lighty, Miller and Scott parcels which they did purchase.

14. By reason of Defendants Olden, Dixon and Naismith's fraudulent failure to disclose the existence, depth and extent of the fill, Plaintiffs Foss were damaged in the amount of $19,417.00, and by reason of said fraud, said Plaintiffs in the sound discretion of the Court shall have interest on said sum from June 30, 1963, to November 9, 1967. The said sum of $19,417.00 represents the difference between the value of that with which Plaintiffs Foss parted and the actual value of that which said Plaintiffs received. together with additional damage arising from the purchase of the Foss Parcel by said Plaintiffs. Said sum consists of the following expenditures made by Plaintiffs Foss: $10,000.00 as a down payment; $217.00 as escrow expenses made in connection with the sale; $1,596.00 on account of principal payments made on a promissory note, which Plaintiffs Foss duly executed as a part of the purchase which was secured by a first trust deed on the said parcel; $5,469.00 on account of interest payments made on said promissory note, secured by said first deed of trust on said parcel; $280.00 on account of interest payments made on a promissory note which Plaintiffs Foss duly executed as a part of the purchase of said property and which was secured by a second deed of trust on said property; $550.00 on account of the proportionate share of real property taxes which were paid by Plaintiffs Foss, but which was not attributable

to the actual value of that which Plaintiffs Foss received. In addition, said Plaintiffs Foss laid out and expended the sum of $1,305.00 for permanent improvements to the Foss Parcel, which were made by reason of the purchase of the said parcel and which were totally lost to these Plaintiffs by reason of the fraud of said Defendants Olden, Dixon and Naismith.

15. By reason of Defendants Olden, Dixon and Naismith's fraudulent failure to disclose the existence, depth and extent of the fill, Plaintiffs Lighty were damaged in the amount of $28,316.00, and by reason of said fraud, said Plaintiffs in the sound discretion of the Court shall have interest on said sum from October 28, 1963, to November 9, 1967. The said sum of $28,-316.00 represents the difference between the value of that with which Plaintiffs Lighty parted and the actual value of that which said Plaintiffs received, together with additional damage arising from the purchase of the Lighty Parcel by said Plaintiffs. Said sum consists of the following expenditures made by Plaintiffs Lighty: $14,872.00 as a down payment; $2,774.00 on account of principal payments made on a promissory note which Plaintiffs Lighty duly executed as a part of the said purchase which was secured by a first deed of trust on said parcel; $6,571.00 on account of interest payments made on said promissory note, secured by said first deed of trust on said property; $1,000.00 on account of principal payments on a promissory note which Plaintiffs Lighty duly executed as a part of the said purchase which was secured by a second deed of trust on the said parcel; $375.00 on account of interest payments made on a promissory note which Plaintiffs Lighty duly executed as a part of the purchase of said property and which was secured by a second

deed of trust on said property; $650.00 on account of the proportionate share of real property taxes which were paid by Plaintiffs Lighty, but which was not attributable to the actual value of that which Plaintiffs Lighty received.

In addition, said Plaintiffs Lighty laid out and expended the sum of $2,074.00 for permanent improvements to the said parcel, which were made by reason of the purchase of the said parcel and which were totally lost to said Plaintiffs Lighty by reason of the fraud of Defendants Olden, Dixon and Naismith.

16. By reason of Defendants Olden, Dixon and Naismith's fraudulent failure to disclose the existence, depth and extent of the fill, Plaintiffs Miller were damaged in the amount of $17,304.00, and by reason of said fraud, said Plaintiffs in the sound discretion of the Court shall have interest on said sum from July 30, 1963, to November 9, 1967. The said sum of $17,-304.00 represents the difference between the value of that with which Plaintiffs Miller parted and the actual value of that which said Plaintiffs received, together with additional damage arising from the purchase of the Miller parcel by said Plaintiffs. Said sum consists of the following expenditures made by Plaintiffs Miller: $11,900.00 as a down payment; $1,459.00 on account of principal payments made on a note which Plaintiffs Miller duly executed as a part of the purchase which was secured by a first trust deed on said parcel; $3,349.00 on account of interest payments made on said promissory note, secured by said first deed of trust on said parcel; $596.00 on account of the proportionate share of real property taxes which were paid by Plaintiffs Miller, but which was not attributable

to the actual value of that which Plaintiffs Miller received.

17. By reason of Defendants Olden, Dixon and Naismith's fraudulent failure to disclose the existence, depth and extent of the fill, Plaintiffs Scott were damaged in the amount of $23,000.00 and by reason of said fraud, said Plaintiffs in the sound discretion of the Court shall have interest on said sum from October 14, 1960 to November 9, 1967. The said sum of $23,000.00 represents the difference between the value of that with which Plaintiffs Scott parted and the actual value of that which said Plaintiffs received, together with additional damage arising from the purchase of the Scott Parcel by said Plaintiffs. Said sum consists of the following expenditures made by Plaintiffs Scott: the sum of $21,500.00, which was the portion of the down payment, lost by reason of the fraud; $1,500.00 on account of the proportionate share of real property taxes which were paid by Plaintiffs Scott, but which was not attributable to the actual value of that which Plaintiffs Scott received.

18. During the course of trial, Plaintiffs and each of them waived any and all right to receive interest between November 9, 1967, and the date of entry of judgment.

19. During the trial and prior to the judgment, Defendant Joseph N. Schiro paid to Plaintiffs Lighty the sum of $9,000.00 and waived any and all right to sanctions imposed against Plaintiffs by the Court, and received, in consideration therefor, a dismissal with prejudice which was filed dismissing him from this action. The dismissal with prejudice was given in good faith, and Defendants Olden, Dixon and Naismith are

entitled to a credit for the damages assessable against them in favor of Plaintiff Lighty in the sum of $9,000.00.

20. During the course of trial and prior to the judgment, Defendant Kermit J. Baumoel paid to Plaintiffs Scott the sum of $8,000.00 and to Plaintiffs Foss the sum of $2,000.00, and received in consideration therefor, a dismissal with prejudice which was filed dismissing him from this action. In addition, Defendant Baumoel waived any and all right to sanctions imposed against plaintiffs by the Court. The dismissal with prejudice was given in good faith. Defendants Olden, Dixon and Naismith are entitled to a credit for the payment of the sum of $8,000.00 for the damages assessed against them in favor of Plaintiffs Scott and are entitled to a credit for the sum of $2,000.00 for the damages assessed against them in favor of Plaintiffs Foss.

21. Defendants Olden, Dixon and Naismith are entitled to a credit of $3,000.00 as sanctions assessed jointly against plaintiffs by the Court during the course of trial. The sum shall be deducted from damages assessed in favor of plaintiffs against said defendants.

22. The Court finds in all respects as set forth in the Conclusion of Law.

CONCLUSIONS OF LAW

1. The Court concludes in all respects as set forth in the foregoing Findings of Fact.

2. Plaintiffs Foss were defrauded by defendants and co-conspirators Olden, Dixon and Naismith, jointly and severally, at the time said plaintiffs purchased the Foss Parcel, and are entitled to judgment against said defendants, jointly and severally, in the amount of

$19,417.00, together with interest in said sum at the rate of 7% per annum thereon from June 30, 1963, to November 9, 1967. There shall be deducted from said judgment and interest the sum of $2,750.00 on account of sanctions and payment made by Defendant Kermit J. Banmoel for a dismissal with prejudice.

3. Plaintiffs Miller were defrauded by defendants and co-conspirators Olden, Dixon and Naismith at the time the said plaintiffs purchased the Miller parcel and are entitled to judgment against said defendants, jointly and severally, in the amount of $17,304.00, together with interest on said sum at the rate of 7% per annum thereon from July 30, 1963, to November 9, 1967. There shall be deducted from said judgment and interest, the sum of $750.00 on account of sanctions.

4. Plaintiffs Lighty were defrauded by defendants and co-conspirators Olden, Dixon and Naismith, jointly and severally, at the time said plaintiffs purchased the Lighty Parcel, and entitled to judgment against said defendants, jointly and severally, in the amount of $28,316.00, together with interest in said sum at the rate of 7% per annum thereon from October 28, 1963, to November 9, 1967. There shall be deduced from said judgment and interest the sum of $9,750.00 on account of sanctions and payment made by Defendant Joseph N. Schiro for a dismissal with prejudice.

5. Plaintiffs Scott were defrauded by defendants and co-conspirators Olden, Dixon and Naismith at the time said plaintiffs purchased the Scott Parcel and are entitled to judgment against said defendants, jointly and severally, in the amount of $23,000.00, together with interest on said sum at the rate of 7% per annum thereon from October 14, 1960, to November 9, 1967.

There shall be deducted from said judgment and interest, the sum of $8,750.00 on account of sanctions and payment made by Defendant Kermit J. Baumoel for a dismissal with prejudice.

6. Plaintiffs Foss, Lighty, Miller and Scott are entitled to recover their costs of suit from defendants Olden, Dixon and Naismith, and each of them.

7. LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 20, 1969.

/s/ Orlando H. Rhodes

Judge of the Superior Court

APPENDIX F.

Judgment.

POLLOCK AND PALMER
Attorneys at Law
612 South Flower Street
Los Angeles, California 90017
Telephone 624-1304

Attorneys for Plaintiffs

Superior Court of the State of California, for the County of Los Angeles.

Herbert C., Jr., and Orlene J. Foss; Elton E., Jr., and Cecelia J. Miller; William A. and Linda T. Scott; and John A. and Francis Mary Lighty, Plaintiffs, vs. B. M. Olden; Thos. J., Jr., and Billie A. Dixon, and Alvin R. Naismith, Defendants. No. WEC 2316.

Filed: April 8, 1969.

This cause came on regularly for trial before the Court, sitting without a jury, on November 8, 1967, a jury trial having been duly waived by all parties. Pollock and Palmer, by Samuel C. Palmer, III, appeared as attorneys for plaintiffs; Valensi and Rose, by Sidney R. Rose, appeared as attorneys for defendant B. M. Olden; Walter R. Trinkaus and Nicholas Granet appeared as attorneys for THOMAS J. DIXON, JR., and BILLIE A. DIXON, and George A. George and Joseph George appeared as attorneys for defendant ALVIN R. NAISMITH. The Court heard the testimony and examined the evidence offered by the respective parties, and being fully advised in the premises and having signed and filed its Findings of Fact and Conclusions of Law, and having directed that judgment be

entered in accordance therewith, now, therefore, by reason of the law and Findings and Conclusions:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiffs HERBERT C. FOSS and ORLENE J. FOSS have and recover judgment against defendants B. M. OLDEN, THOMAS J. DIXON, JR., BILLIE A. DIXON and ALVIN R. NAISMITH, jointly and severally, and after deducting offsets and credits, for the sum of $16,667.00, together with interest on the sum of $19,417.00 at the rate of 7% per annum from June 30, 1963, to November 9, 1967, which said interest is in the sum of $5,920.00.

2. That plaintiffs ELTON E. MILLER, JR., and CECELIA J. MILLER have and recover judgment against defendants B. M. OLDEN, THOMAS J. DIXON, JR., BILLIE A. DIXON and ALVIN R. NAISMITH, jointly and severally, and after deducting offsets and credits, for the sum of $16,554.00, together with interest on the sum of $17,304.00 at the rate of 7% per annum from July 30, 1963, to November 9, 1967, which said interest is in the sum of $5,174.85.

3. That plaintiffs WILLIAM A. SCOTT and LINDA T. SCOTT have and recover judgment against defendants B. M. OLDEN, THOMAS J. DIXON, JR., BILLIE A. DIXON and ALVIN R. NAISMITH, jointly and severally, for the sum of $14,250.00, together with interest on the sum of $23,000.00 at the rate of 7% per annum from October 14, 1960, to November 9, 1967, which said interest is in the sum of $11,386.22.

4. That plaintiffs JOHN A. LIGHTY and FRANCES MARY LIGHTY have and recover judg-

ment against defendants B. M. OLDEN, THOMAS J. DIXON, JR., BILLIE A. DIXON and ALVIN R. NAISMITH, jointly and severally, and after deducting offsets and credits, for the sum of $18,566.00, together with interest on the sum of $28,316.00 at the rate of 7% per annum from October 28, 1963, to November 9, 1967, which said interest is in the sum of $7,994.55.

5. That plaintiffs have or recover judgment for their costs or disbursements incurred in this action, in the sum of $30.00.

Dated: April 8, 1969.

RHODES

Judge of the Superior Court

APPENDIX G.

Statement of Facts.

On July 8, 1957, B. M. Olden entered into an agreement to convey a tract of Malibu real estate to defendants Alvin Naismith, Thomas Dixon and Billie Geldner, who as joint venturers would become owners of the property. [R.T., pp. 898, 1474, 1486, 2109; Ex. 21.] The sale price was to be $140,000.00 [R.T., p. 345]; $20,000.00 cash and a $120,000.00 note. [R.T., p. 345; Ex. 21.] On July 9, 1957, an escrow, number 3455, was opened with Assured Escrow Services to complete the sale of this tract of land. [Ex. 22.]

Sometime during August or September of 1957, defendants Naismith and Dixon decided that for various reasons they no longer wished to hold the property jointly [R.T., pp. 1269, 2364]; rather, they decided to split their interests and each own different sections of the land. [R.T., pp. 847-848, 916-917, 1266, 2341.] The end result was that defendant Dixon came to own as a single parcel the four lots involved in this lawsuit [R.T., p. 1476], as well as certain other pieces of the land. Defendant Naismith became the owner of other parts of the land, and Miss Geldner, who later became Mr. Dixon's wife, owned still other parts. [R.T., pp. 1273-1274.]

During 1959, the four residential lots involved in this suit were sold to speculative builders by defendant Dixon, the sales being two lots to defendant Kermit Baumoel, one to defendant Joseph Schiro and one to defendant Paul Nelson. [Exs. 6-A-1, 6-B, 6-C, 6-D.] These defendant speculative builders constructed houses on each of their respective lots and, during the period 1960 to 1961, sold the houses to the plaintiffs in-

volved herein. [R.T., pp. 1364-65, 1617-18, 1653, 1710-1711.] None of these builders or homeowners had ever known or had any contact with B. M. Olden until this trial began in 1968. [R.T., pp. 971, 1343, 1386, 1462, 1632, 1671, 1726, 2315.] The plaintiffs had not come into their ownership until three to four years after Olden had sold the above property.

A. April 1952 Through July 1957: Olden Ownership.

In April, 1952, B. M. Olden bought a parcel of land, "situated in the County of Los Angeles and State of California, being a portion of the Rancho Topanga Malibu Sequit" from the Marblehead Land Co. [Ex. 1.] On this land, which included the property involved in this lawsuit, Mr. Olden initially intended to construct a hotel and apartment houses. [Finding of Fact 2, C.T., p. 184; R.T., pp. 277, 1981-82, 2580.] So, in 1952 to 1953, Olden began to grade the property under the close supervision of the Donald Warren Co., a firm of Soils Engineers. [R.T., pp. 1998-2000, 2571.] The grading was begun on the upper bench of the land. [R.T., p. 1998.] A Warren Co. representative was continually on the site and required that all organic material be removed before any fill was placed thereon. [R.T., p. 2571.] Though there were as yet no Los Angeles County standards for this type of work [R.T., p. 766], Mr. Olden intended it to be carefully done. [R.T., p. 458.] Tests showed that it was. At the completion of the job, the Warren Co. made field density tests and issued a report showing better than ninety per cent compaction on most parts of the land. [Deft. Olden's Ex. "B".] Thus, Mr. Olden's work measured up to standards which the County of Los Angeles did not require until four years later when Los Angeles

County adopted its first grading ordinance. [R.T., p. 766.]

Though he had intended originally to develop the land as a hotel site, Mr. Olden's plans were required to be changed in 1954. Because of his involvement with the Congress of Motor Hotels, in 1954 Mr. Olden no longer had the time to develop the property. [R.T., p. 2007]. Therefore, he decided to sell a portion of the parcel he had acquired from Marblehead Land Co. [R.T., p. 2007].

In his desire to help his step-son, Alvin Naismith, who had just recovered from polio [R.T., pp. 1983-1984, 2148], Mr. Olden proposed to defendant Naismith that, if he would find a partner to work with Naismith, Olden would sell to defendant Naismith and his partner the eastern portion of the land on reasonable terms. [R.T., pp. 1984, 2148-2150.] Mr. Naismith found a partner, a Mr. Rousey, and Mr. Olden conveyed the east end of the land to the partners in March, 1955. [Ex. 2.] Eventually, though Naismith and Rousey developed part of the land, a certain portion of it was returned to Mr. Olden in lieu of foreclosure. [Exs. 2-F, 2-G, 2-H.]

During the Spring of 1957, Mr. Olden, still lacking time and liquid funds because of his involvement with the Congress of Motor Hotels [R.T., p. 2256], proposed to his son Naismith that he obtain a partner with whom Naismith could buy the lower bench of the western portion of the property. [R.T., pp. 2150-2151.] Defendant Naismith interested Thomas Dixon, the President of Security Federal Savings and Loan Association, in the property; and in May or June of 1957, Mr. Dixon inspected the property being offered. [R.T., pp. 2410-2411.] He became interested, and in association with

Naismith, began negotiating with B. M. Olden. [R.T., p. 775.]

While the negotiations for the purchase and sale were progressing, Mr. Olden was doing some further minor fill work to complete the 1952-53 grading of the property. [R.T., p. 2155.] At this time, he also had Mr. Quiros, his surveyor, prepare a grading map for said lower bench. [R.T., pp. 2008-2009.] Mr. Olden agreed with defendants Naismith and Dixon that he (Olden) would sell the property for $140,000.00 and would complete the compaction work and some paving work for the buyers. [R.T., p. 2013; Ex. 21.] The Donald Warren Co. was again to supervise and test any grading work to be done.

On or about July 8, 1957, the negotiations were completed and the parties entered into a written agreement. [Ex. 21.] Mr. Olden agreed to convey substantially the entire lower bench to Naismith, Dixon and Geldner jointly. All parties signed the agreement and an escrow, number 3455, was opened pursuant to that agreement on July 9, 1957. [Ex. 22.] $20,000.00 in cash was deposited in that escrow along with a note for $120,000.00. At that point, B. M. Olden had sold substantially all of the lower bench of the west end of his Malibu property, including the lots involved in this lawsuit; and he still owned the upper bench of the property.

B. July 1957 Through 1962 Ownership: Dixon—Builders—Plaintiffs.

Thomas Dixon, Billie Jean Geldner and Alvin Naismith jointly purchased substantially all of said lower bench. [Ex. 21, 22.] In accordance with the July 8 agreement, B. M. Olden performed the 1957

grading operations on the property. [R.T., p. 2173.] Pursuant to the new Los Angeles County Grading Ordinance, Mr. Olden obtained a grading permit on July 11, 1957. [R.T., pp. 1355-1361.] The work was again supervised by the Donald Warren Co., which issued a final report dated September 24, 1957, stating that the compaction was again ninety per cent or better. [Deft. Olden's Ex. "C".] One copy of this report was sent to the Los Angeles County Building Department, which also had made its own inspections of the work, and was made a part of the public record in the grading permit file. [R.T., pp. 249, 1355-1361.] Defendant Olden informed both defendants Dixon and Naismith of the fill operations. [R.T., pp. 2016, 2188.] Mr. Naismith confirmed that he saw the 1957 Warren Report. [R.T., pp. 787, 2344.] Defendant Dixon denied he did; but he stated he knew of the 1957 fill operation [R.T., pp. 1092-1093, 1492, 1505, 2412], and it was provided for in the agreement that he signed with Mr. Olden. [Ex. 21.]

While Mr. Olden was completing his part of the transaction, defendants Dixon and Naismith began, without the knowledge of defendant Olden [R.T., pp. 916-917], to question the business implications of tying themselves (Dixon and Naismith) together in a joint venture. [R.T., pp. 916, 1266, 1269.] Mr. Naismith was a speculative builder, and so desired to utilize the property for residential construction and resale. Also, if he joined with Mr. Dixon, he could not obtain loans from Security Federal Savings and Loan, since Mr. Dixon was President of Security Federal. [R.T., p. 2341.] Defendant Dixon had been advised by his accountant not to join together with Naismith in ownership of the property. [R.T., p. 1266.] Accord-

ingly, some time after July 9, Mr. Naismith consulted an attorney, Virginia Gard, about separating the joint interests of Naismith and Dixon. [R.T., p. 1858.] Miss Gard recommended to him and to Mr. Dixon that they do this by checkerboarding their holdings. [R.T., pp. 1487, 1861.] In conformance with this plan, and without the knowledge of Olden, partial cancellation instructions dated September 23, 1957, for escrow 3455, were drawn by Assured Escrow Services for defendants Dixon and Naismith. [Ex. 23.]

Mr. Olden had already received from Assured Escrow, on August 13, 1957, a letter containing a deed to the whole property, which he was to sign and return. [R.T., pp. 2045-2048; Deft. Olden's Ex. L.] This he had done. [R.T., p. 2047.] Now Mr. Dixon stood before him with a request to change the mechanics of the purchase. [R.T., p. 2053.] Mr. Dixon assured him that his capital gain would still be protected in the deal [R.T., p. 2054] and that he (Dixon) would comply with any legal requirements arising because of the change. [R.T., p. 2030.] Mr. Dixon also pointed out that the change would make it possible for Mr. Olden to get his $120,000.00 within two years rather than the five years allowed in the original agreement. [R.T., pp. 2057-2058.] After getting some advice from Title Insurance and Trust Co. [R.T., p. 2058], Mr. Olden acceded to the request of Mr. Dixon. [R.T., pp. 2063-2064; Ex. 23.]

Said first partial concellation dated September 23, 1957, [Ex. 23] in accordance with the original and basic agreement of July 8, provided for accrual of interest on the dates as originally agreed, and that defendants Naismith, Dixon and Geldner would become the owners of said lower bench; only now, such owner-

ship was not joint and each would hold title to a separate portion of the lower bench. Three new escrows, numbers 3487, 3488 and 3489, were pened for defendants Naismith, Dixon and Geldner separately. [Exs. 26, 27, 28.] Then, defendants Dixon and Geldner having been married, two more escrows were opened for them jointly, followed by a last one for defendant Naismith. [Exs. 29, 30, 31.] Thus, with the one minor exception of defendant Olden's retention of the westerly tip of the property, the agreement of July 8, had been completed in essence.

Mr. Dixon and his wife had taken title to the part of the property which was eventually to become the homesites of the plaintiffs in this lawsuit. [R.T., pp. 425 *et seq.*, 1476; Exs. 6, 30.] Escrow number 3827 for this part of the property was opened on January 31, 1958. [Ex. 30.] The Dixons paid $23,500.00 in cash to Mr. Olden outside of escrow on that date, and the deed was delivered to the Dixons. [R.T., p. 1476.]

On April 18, 1958, a declaration of restrictions covering the property purchased by the Dixons and Naismiths was recorded. [Ex. 6-E.] Virginia Gard, the attorney at Assured Escrow, had drawn these at the request of defendants Dixon and Naismith. [R.T., pp. 1487-1489.] Neither at that time nor during Dixon and Naismith's previous dealings with her, had Miss Gard dealt with or for defendant Olden. [R.T., pp. 1855-1856, 1859.] The declaration of restrictions provided for the maintenance of certain standards for the building of homes on the property covered, which included the whole property purchased by defendants Dixon and Naismith from B. M. Olden. [Ex. 6-E.]

The declaration was signed by Mr. Olden on April 11, 1958. [Ex. 6-E.] Miss Gard had included him in the declaration of restrictions because it was easier mechanically for her to draw them and because Mr. Olden still owned the entire upper bench and other parts of his original purchase. [R.T., pp. 1944-1948.] After signing the declaration of restrictions, B. M. Olden had no further activity of any substance with reference to the property involved in this lawsuit until the suit was filed in December of 1962. [Finding of Fact 10; C.T., p. 187.] The sites of the plaintiffs' homes had been deeded over to Dixon on the payment of cash [R.T., p. 1476], and Olden neither discussed any dealings in the property with Dixon [R.T., p. 1476] nor met or dealt with any of Dixon's successors (*i.e.* the defendant builders and the plaintiffs herein) who acquired the four lots, involved in this lawsuit.

In September, 1957, a map had been prepared by Mario Quiros which set forth the division of the purchase by defendants Naismith, Dixon and Geldner. [Exs. 19-A, 19-B.] Mr. Dixon's property, which became the property of the plaintiffs involved in this lawsuit, was referred to on that map as parcel "C" numbers one through four.[3]

Defendant Naismith was the first one to resell any of the property. He sold a parcel to a Mr. Pritcher on March 3, 1958. [Ex. 3-A.] More than a year later defendant Dixon made his first sale of a portion of the land. He sold lot one of parcel "C" to Parker Manufacturing Company by a deed dated May 12, 1959, for $10,000.00. [Ex. 6-A.] On the same day, Parker

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[3]Henceforth in this Statement of Facts parcel "C" shall be a reference to the property purchased by the plaintiffs; lot "C-1", etc., shall refer to one of the future homesites on parcel "C".

Manufacturing Company sold the same lot to Paul Nelson, one of the defendant builders, for $13,500.00. [Ex. 6-A-1.] Defendant Nelson constructed a house on the property and obtained some financing from Security Federal, and then sold the house to plaintiff Miller by a deed dated July 24, 1961. [R.T., pp. 1710-1711; Ex. 6-A-2.]

Mr. Dixon sold lot "C-2" to Joseph Schiro, another of the defendant builders, on November 3, 1959. [R.T., pp. 2448, 2450-2451; Ex. 6-B.] Because defendant Schiro wished to obtain his construction loans from Security Federal, Mr. Dixon arranged for Mr. Naismith to take the deed of trust note. [R.T., pp. 778-779.] Defendant Schiro constructed a house on the lot and sold it to plaintiffs Lighty by a deed dated March 31, 1960. [R.T., p. 1653; Ex. 6-B-1.]

Lots "C-3" and "C-4" were sold by Mr. Dixon to defendant Kermit Baumoel by a deed dated November 4, 1959. [Exs. 6-C, 6-D.] The deal was arranged with defendant Dixon by Mel Linch, a speculative builder who was doing work for defendant Baumoel. [R.T., pp. 2284-2286; Ex. 48.] Mr. Linch arranged the loans and handled the sale of the property for defendant Baumoel. The Linch Construction Company constructed a residence on each lot. [R.T., pp. 2281-2283.] Lot "C-3" was purchased from defendant Baumoel by plaintiffs Foss by a deed dated July 18, 1960. [R.T., pp. 1364-1365; Ex. 6-C-1.] Lot "C-4" was purchased by plaintiffs Scott from defendant Baumoel by a deed dated December 6, 1960. [R.T., pp. 1617-1618; Ex. 6-D-1.]

The plaintiffs, as they each made clear in remarkably similar testimony, were each very concerned that

there be no fill on their respective property; so, with the exception of plaintiff Miller [R.T., p. 1718], who made no inquiry at all, each plaintiff asked his seller, the builder who had constructed the house, if there was fill on the particular site. [R.T., pp. 1370 (Foss), 1621 (Scott), 1656-1657 (Lighty).] The builders uniformly replied there was none; that the ground was "solid cut." [R.T., pp. 1370, 1621, 1656-1657.] That was enough for each plaintiff, even though one was an engineer [R.T., pp. 1377-1378] and all were very adamant about their concern with the fill. [R.T., pp. 1370, 1415-1416, 1659.] No one bothered to check the pubiic records of the County Building and Safety Department, wherein there was a grading permit file containing the Warren Reports on the fill operations. [R.T., pp. 1415-1416, 1628, 1749-1750.] Despite their knowledge to the contrary, the builders had stated (and the plaintiffs accepted) that the foundations of the houses were dug into solid ground.

Defendant Dixon, testified that he had told each builder that there was fill on his particular lot. [R.T., pp. 1516, 2426-2427.] Each builder denied he had been so informed [R.T., pp. 1324, 1447-1448], and, of course, each denied seeing the file in the Malibu Building Department records, though each had been there to obtain a permit to build upon his lot(s). However, each builder knew that there was fill on the property. Builder Paul Nelson stated he could see the fill visually, but said he thought it did not run to his lot. [R.T., pp. 1465-1467.] He also stated that he had found fill in the trench that he had dug in the yard of his lot. [R.T., p. 1448.] He also had seen the excavation work being done on the property even before he had become interested in buying. [R.T., pp.

1464-1465.] Builder defendant Joseph Schiro admitted having been told by defendant Dixon that the property was an engineered fill [R.T., pp. 2449; 2461, line 26] and knew that the County Engineers had supervised the grading. [R.T., pp. 2461-2462.] He also knew, along with Mr. Linch, that the property was no longer in its natural state, but had been graded extensively. [R.T., pp. 1343 (Schiro), 2291-2292 (Linch).] Despite their knowledge of the grading [R.T., pp. 1343, 1448, 2312, 2449, 2461], the only interest of each builder was that his lot was buildable. [R.T., pp. 1468, 2293, 2461-2462.] No builder defendant was interested in informing the plaintiffs that fill existed.

So it was that each plaintiff bought his house from one of the defendant builders under the mistaken belief that the land being bought was solid cut. It was in 1962, after making test borings on the land, that the plaintiffs first discovered that, contrary to the representations of the builder defendants, there was indeed fill on each of their lots. [R.T., pp. 1372-1373.] Consequently, this lawsuit was filed on December 20, 1962. [C.T., p. 1.]

APPENDIX H.

Declaration of Sidney R. Rose in Support of Motion for New Trial.

VALENSI, ROSE & GERSTENFELD
8665 Wilshire Blvd., Suite 312
Beverly Hills, California 90211
655 5656—657 2822

Attorneys for Defendant
B. M. Olden

Superior Court of the State of California, for the County of Los Angeles.

Herbert C., Jr. and Orlene J. Foss, et al., Plaintiffs, vs. B. M. and Blanche M. Olden, et al., Defendants. No. WEC 2316.

Filed: May 1, 1969.

State of California, County of Los Angeles—ss.

SIDNEY R. ROSE declares and states:

1) That he is one of the attorneys representing defendant B. M. OLDEN in the within matter.

2) That the within case was filed December 20, 1962, and declarant was substituted as counsel for defendant OLDEN in September, 1967, at which time the case had been through pretrial and was apparently at issue and set for trial November 8, 1967.

3) Upon appearing for trial November 8, 1967, it became apparent that the case was not at issue, the plaintiffs having failed to obtain the appearance of defendants BAUMOEL after granting same an indefinite extension of time to plead. Thereafter, the case was continued to November 9, 1967, at which time the Hon. Orlando H. Rhodes, Judge Presiding, made a detailed

Order requiring the parties and their counsel to participate in certain additional pretrial procedures in preparation for trial, which was continued to December 18, 1967.

4) Plaintiffs and their counsel failed to comply with said Order and as a result of which defendant OLDEN, as well as the other defendants herein, moved the Court for a dismissal for failure to diligently prosecute the within action, and upon hearing of said Motion for Dismissal on December 18, 1967, the Hon. Orlando H. Rhodes, Judge Presiding, conceded "as we all well know, the Court is here confronted with a matter which I believe perhaps would not be an abuse of discretion if this Motion to Dismiss for lack of prosecution were granted . . ." but the Court thereafter at said hearing denied said Motion and received a limited amount of testimony for the purpose of commencing the trial in order to avoid the application of the mandatory five-year dismissal rule.

5) The cause was then continued for further trial to March 11, 1968, with direction being given to counsel for plaintiffs to associate competent trial counsel.

6) Thereafter, Pollock and Palmer made an ex parte motion to be substituted as counsel for plaintiffs, and no parties were noticed with reference to said motion except the former counsel of plaintiffs, Richard George. Mr. Palmer filed with the Court in connection with the Motion to Substitute a Notice of Motion, attached to which was a photocopy of a letter from Richard C. George dated February 11, 1968, addressed to Pollock and Palmer, referring to certain difficulties existing between Mr. Palmer and Mr. George with reference to the substitution. Included in said photocopy was a state-

ment ". . . pending settlement negotiations have tentatively reached a figure in excess of $20,000.00 . . .," and such Notice of Motion and the exhibit attached thereto were never served upon defendants herein, and declarant did not become aware of the contents of said Notice of Motion or said letter until March 10, 1969.

7) To declarant's knowledge, there were not pending any negotiations for settlement "in excess of $20,000.00" or in any way approaching said sum with reference to the within matter at the time of the hearing of the Motion for Substitution, and declarant was never informed by Mr. Palmer or any other party that the Court had been informed of any negotiation or proposed settlement amount, and declarant would have objected vigorously to such statement being communicated to the trier of fact herein, particularly at a time when, as Mr. Palmer knew, it was the intention of declarant to continue to move the Court for a dismissal for lack of diligent prosecution.

8) That thereafter the Court, with the belief that plaintiffs apparently could receive no less than the purported $20,000.00 settlement negotiation, denied the Motions for Dismissal of declarant and other counsel.

9) Declarant has been a practicing attorney trying cases before the courts of this state for more than the past 17 years and has never been subjected to the unfair and palpably prejudicial effect of a settlement negotiation by opposing counsel being communicated to the trier of fact.

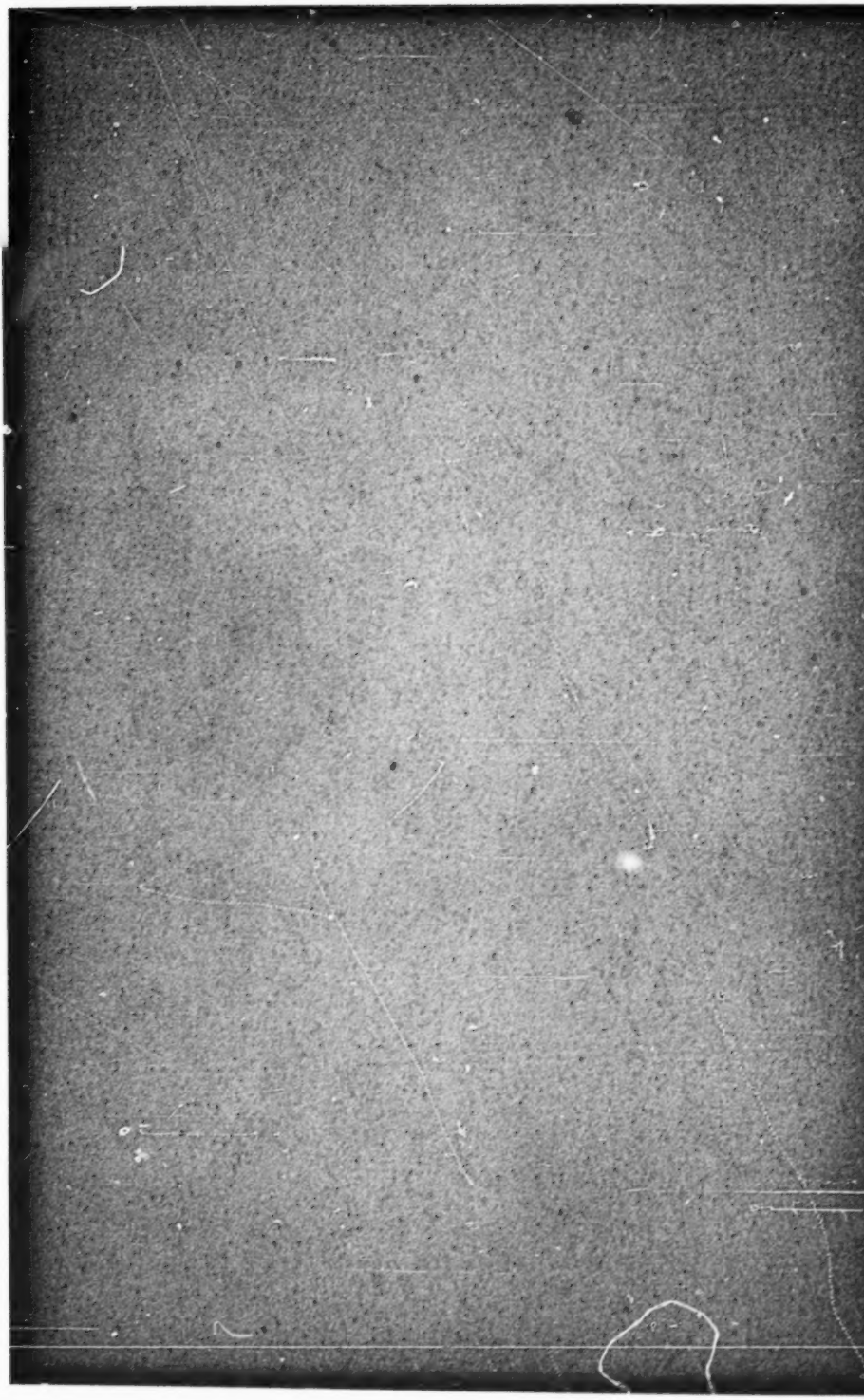
10) That the trial of the within matter occupied many weeks and there were innumerable orders in connection with motions, questions of evidence and procedural matters which were made by the Court, and it is

respectfully submitted that the Court in the making of such rulings, orders and determinations and in the drawing of inferences from the evidence adduced, was inevitably influenced by the awareness of the apparent offer of settlement, to the material prejudice of defendant Olden.

I declare under penalty of perjury that the above and foregoing is true and correct. DATED April 30, 1969.

/s/ Sidney R. Rose

Sidney R. Rose



IN THE

Supreme Court of the United States

October Term, 1974

No. 74-39

B. M. OLDER,

Petitioner,

v.

HERBERT D. JR., and ORLENE J. FOSS, et al.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal in the State of California, First Appellate District

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SAMUEL C. PALMER III,
Attorney for Respondents.

GIBSON & PALMER,
1 Wilshire Building,
Suite 2620,
Los Angeles, Calif. 90017,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles, Phone 24-4628

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IN THE

Supreme Court of the United States

October Term, 1974
No. .....

B. M. OLDEN,

Petitioner,

vs.

HERBERT D., JR., and ORLENE J. FOSS, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal in the State of California, Second Appellate District

Respondents Herbert D., Jr. and Orlene J. Foss, Elton E. Miller, Jr., and Cecelia J. Miller, William A. Scott and John A. Lighty and Frances Mary Lighty, respectfully pray that the Petition for Writ of Certiorari be denied to Petitioner.

Statement of the Case

This case involves damage to homes resulting from land fill subsidence. Trial court liability was based on a failure of certain parties to disclose that the homes were built on fill ground. The judgment of the Court in favor of Respondents and against Petitioner and others was entered on April 9, 1969 in the aggregate sum of $97,542.62, including costs and interest to date of judgment.

The only factual dispute material to the Petition for Writ of Certiorari relates to the circumstances surrounding a substitution of attorneys. In 1968, Respondents sought to accomplish a substitution of attorneys. The reluctance of Respondents' original counsel to step aside necessitated an *ex parte* motion. The motion was heard on February 9, 1968. [RT 115.] The California Code of Civil Procedure, § 284, did not, at that time, nor does it now, require notice to be given to opposing counsel of such a motion; however, in accordance with local practice, Respondents' present counsel telephonically advised Petitioner's counsel of the pending motion. The petition omits any mention of that phone call and of the fact that the moving papers were filed with the Clerk of the Court, thereby becoming of public record. In fact the petition strongly implies that there was no notice.

Attached to the motion was a letter from Respondents' original counsel herein in which said counsel indicated that negotiation settlements were in process and had "tentatively reached the figure of $20,000.00." The letter was submitted not for the purpose of bringing the passing reference to settlement to the attention of the trier of fact, but to establish the difficulties Respondents' new counsel was experiencing with former counsel and to compel former counsel to produce documents sorely needed by Respondents in the prosecution of their action. The judge received the letter solely for purpose of the motion for substitution and emphatically stated that he had at no time used the letter as an

element in determining either liability or extent of damages.

Petitioner appealed the entire case to the Court of Appeal of the State of California. One of the errors asserted on appeal was a claim of material prejudice relating to the letter which was appended to the moving papers in support of the motion for substitution of attorney. The Court of Appeal rejected that claim of error as being totally without merit. [Petition, Appendix A, p. 14.] On May 1, 1974, the Supreme Court of the State of California denied a hearing on this matter. [Petition, Appendix A, p. 16.]

At no time during the state trial or appellate proceedings did Petitioner rely on the provisions of the 14th Amendment of the Constitution of the United States or any Federal treaty or regulation. Petitioner's arguments were based solely on California law and were decided solely on that basis.

ARGUMENT AGAINST GRANTING THE WRIT

1. By failing to raise the 14th Amendment due process argument at any stage of the state court proceedings, Petitioner has waived any such claim and cannot now urge the due process claim as a basis for granting a writ. (*Cardinale v. Louisian,* 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969).)

2. This case does not present a substantial federal question to support jurisdiction under 28 U.S.C. 1257 (3). Petitioner lists the following landmark cases on bias, none of which are relevant to the instant case: (1) *Tumey v. Ohio,* 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1926) (a criminal case in which the judge who heard the matter was the mayor of a small municipality which depended in large part financially upon the revenues generated by fines. Bias was found in the fact that the hearing judge had a definite, although not personal, financial interest in the outcome of the case); (2) *Burger v. United States,* 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921), (a criminal case in which the judge was openly prejudiced against Germans and Americans of German ancestry, openly avowing such in the courtroom, when the defendants were either natives of Germany or American of German ancestry. The court held that such an opinion and such hostility effectively destroyed any pretense of due process); (3) *In re Murchison,* 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1954); (4) *Offut v. United States,* 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954), (criminal cases involving contempt citations); and (5)

Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 43, 67 L. Ed. 157 (1937), (a rate-setting and roll back case in which the Commission explicitly and directly relied on evidence which it deliberately kept hidden from the Petitioner). The brief synopsis of the cases cited by Petitioner show their inapplicability to the case under consideration. Can it seriously be urged that *one* sentence in a three paragraph letter referring to a nuisance value settlement, which the judge stated in open court had no bearing on his decision [R.T. 3433], evidences the existence of elements of prejudice and bias similar to the prejudice found to exist in the cases cited by Petitioner?

Petitioner's argument that the reference to settlement was error is premised on California Evidence Code § 1152, which precludes the admission of evidence of settlement disputes in light of the potentially unmerited weight which a jury of laymen might give such evidence. The California Court of Appeals has concluded that when evidence is so admitted in a case tried to a judge as trier of fact, there is no error where the trial judge has "voluntarily remarked that since there was no jury he would disregard any evidence of an offer to compromise." *Cano v. Tyrrell,* 256 Cal. App. 2d 824, 834, 64 Cal. Rptr. 522, 528 (1967).

Conclusion

The function of this Court historically has been the examination of Federal questions of importance, not minor questions of State law. *Lau Ow Bew v. United States*, 144 U.S. 47, 36 L. Ed. 340, 12 S. Ct. 517 (1892). Petitioner has sought to invoke the jurisdiction of this Court by using an argument not raised in the lower courts, and one presenting neither a material nor a substantial issue.

It is therefore respectfully submitted that the prayed for writ of certiorari should not be issued.

Respectfully submitted,

SAMUEL C. PALMER III,
Attorney for Respondents.

GIBSON & PALMER,
Of Counsel.